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No. 09-960

Supreme Court, U.S.
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In The

Supreme Court of the United States

WILLIAM H. HOGAN, in his Official Capacity as Commissioner of Alaska Department of Health and Human Services, *et al.*,

Petitioners,

v.

KALTAG TRIBAL COUNCIL, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF EDWARD PARKS AND DONIELLE TAYLOR AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTRODUCTION

This case concerns a matter of extraordinary importance to the State of Alaska and its 690,000 citizens, approximately 37,000 of whom are children of Indian, Eskimo, or Aleut descent.[1]

Two of those children are amici curiae's daughters.

Because of the extraordinary importance of the case, amici curiae respectfully suggest that the Court expand the questions it will decide to include:

1. Whether the Ninth Circuit correctly held – in conflict with the doctrine of separation of powers – that a group of individuals of Native American descent can become a "federally recognized tribe" through a judicial decision rendered after an evidentiary hearing, even though Congress has not enacted a statute that confers that legal status and the Secretary of the Interior, acting lawfully pursuant to authority that Congress has delegated, has not conferred that legal status by final agency action?

2. Whether the Ninth Circuit correctly held that a "Native village" in Alaska, which

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[1] No counsel for a party has authored this brief in whole or in part. Alaska Public Interest Projects has made a monetary contribution to the cost of printing the brief. Counsel of record for the petitioners and respondents received notice of the intention of amici curiae to file this brief more than 10 days prior to the due date for the brief.

Congress has designated as an "Indian tribe" for the purposes of the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 *et seq.*, has governmental authority to establish a "tribal court" that has jurisdiction to terminate parental rights and issue adoption decrees to which the State of Alaska must give full faith and credit, even though the ICWA "Indian tribe" has not petitioned the Secretary of the Interior pursuant to § 108 of ICWA, 25 U.S.C. § 1918, for jurisdiction?

INTEREST OF AMICI CURIAE

Amici curiae are parents who have been unlawfully deprived of custody of their children by an Alaska Native "tribal court."

EDWARD PARKS

Edward Parks is thirty-eight years old. His father is Caucasian. His mother is an Athabascan Indian. Mr. Parks was raised in, and until recently has always been a resident of, Fairbanks, Alaska. In 2006 Mr. Parks began a relationship in Fairbanks with Bessie Stearman, an Athabascan Indian who was raised in Minto but who in 2001 relocated to Fairbanks.

Minto is a cluster of houses on the Tolovana River 130 air miles northwest of Fairbanks. In 2000 Minto had a population of 258 persons, 237 of whom

were of Athabascan Indian descent. *See* http://www.commerce.state.ak.us/dca/commdb/CF_BLOCK.cfm [hereinafter "Alaska Community Database"]. In 1971 when it enacted the Alaska Native Claims Settlement Act (ANCSA), Pub. L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. § 1601 *et seq.*), Congress designated Minto as a "Native village" for the purposes of ANCSA. *See* 43 U.S.C. § 1610(b)(1).[1] Edward Parks is not, and has never been, a resident of Minto or a member of any Native organization affiliated with Minto.

On December 7, 2007 in Fairbanks Ms. Stearman gave birth to Mr. Parks's daughter, S.P., who Mr. Parks and Ms. Stearman began raising together. Ms. Stearman has a history of substance abuse problems. In May 2008 when Mr. Parks was working in the North Slope oil fields, unbeknownst to Mr. Parks, Ms. Stearman was incarcerated in Fairbanks on a probation violation. When he returned to Fairbanks Mr. Parks discovered that in his absence the Minto Tribal Court had convened *sua sponte* in Minto, had issued an "order" that purported to give the Native Village of Minto legal custody of S.P., and then had given

[1] For the purposes of ANCSA, a community is a "Native village" if it was "not of a modern and urban character" and it on the 1970 census enumeration date it had twenty-five or more Native residents who collectively were a majority of community residents. *See* 43 U.S.C. § 1610(b)(3). Congress defined the term "Native" as "a citizen of the United States who is a person of one-fourth degree or more Alaska Indian, Eskimo, or Aleut blood, or combination thereof." *See* 43 U.S.C. § 1602(b).

physical custody of S.P. to "tribal" foster parents in Fairbanks, Rozella and Jeff Simmonds. Over Mr. Parks's repeated protestation, for the past twenty months Rozella and Jeff Simmonds have refused to relinquish physical custody of S.P. to Mr. Parks. In May 2009 the Minto Tribal Court issued an "order" in which it purported to terminate Mr. Parks's parental rights to S.P. In September 2009 Mr. Parks filed a custody action against Rozella and Jeff Simmonds in the Superior Court in Fairbanks, *Parks v. Simmonds*, No. 4FA-09-2508 CI (2009). In January 2010 Rozella and Jeff Simmonds moved the Superior Court to recognize and enforce the "order" of the Minto Tribal Court that deprives Mr. Parks of legal and physical custody of S.P. The Superior Court has not decided the motion.

DONIELLE TAYLOR

Donielle Taylor is thirty-three years old. Ms. Taylor is Caucasian and was born and raised in California. Between 1998 and 2000 Ms. Taylor lived in Evansville, Alaska, when she was married to her ex-husband Justin Costello. Mr. Costello had been raised in Evansville. His father was Caucasian. His mother, although three-quarters Caucasian, had a grandmother of Athabascan Indian and Inupiat Eskimo heritage.

Evansville is a cluster of houses on the Koyukuk River 180 air miles northwest of Fairbanks. In 2000 Evansville had a population of 28 persons, 14 of whom were of Athabascan Indian or Inupiat Eskimo

descent. *See* Alaska Community Database. In 1973 the Secretary of the Interior designated Evansville as a "Native village" for the purposes of ANCSA. *See* 43 U.S.C. § 1610(b)(3).

On August 12, 1999 Ms. Taylor gave birth to her and Mr. Costello's daughter, M.C. In 2000 Ms. Taylor's relationship with Mr. Costello ended and she and M.C. left Evansville. Since 2000 Ms. Taylor has had exclusive physical custody of M.C. From January 2008 to February 2010 Ms. Taylor and M.C. resided in Fairbanks where M.C. was enrolled in the fourth grade at Nordale Elementary School.

For reasons it has not explained, on January 18, 2010 in Evansville the Evansville Tribal Court convened *sua sponte* and, without Ms. Taylor's knowledge, issued an "order" that purported to give Evansville Village legal and physical custody of M.C. On the afternoon of January 18, 2010 Ms. Costello received a telephone call from an Evansville Village employee who informed her of the "order." The employee also informed her that the employee had taken M.C. from school and placed her in a "tribal" foster home at an undisclosed location in Fairbanks.

Ms. Taylor immediately telephoned the Fairbanks Police Department. But for the next week Ms. Taylor had no idea where her daughter was living. On January 26, 2010 Ms. Taylor regained physical custody of M.C. when the attorney who represents the Nordale Elementary School advised the school principal that the Evansville Tribal Court "order" had

no legal validity. In response, on February 10, 2010 Evansville Village filed *Evansville Village v. Taylor*, No. 4FA-10-1226 CI (2010), in the Superior Court in Fairbanks to attempt to have the Superior Court recognize and enforce against Ms. Taylor the January 18, 2010 "order" of the Evansville Tribal Court, as well as a second "order." On February 22, 2010 Ms. Taylor moved the Superior Court to dismiss *Evansville Village v. Taylor*. The Superior Court has not decided the motion.

REASONS FOR GRANTING THE WRIT

I. THE QUESTIONS AMICI CURIAE SUGGEST ARE EXTRAORDINARILY IMPORTANT AND SHOULD BE DECIDED BY THIS COURT.

It is difficult to overstate the importance of this case. A majority of Alaska's citizens live in one city, Anchorage, and four towns, Fairbanks, Juneau, Sitka, and Ketchikan. But more than 100,000 Alaskans live in approximately 250 small rural communities scattered throughout the Alaska bush. Like Kaltag, the community in which respondent Kaltag Tribal Council is based, Congress or the Secretary of the Interior has designated more than 200 of those communities as "Native villages" for the purposes of ANCSA, even though thousands of Caucasians and other individuals

of diverse ethnic heritages reside in the communities.

This Court has recognized that *every* parent, including amici curiae, has a "fundamental right" to the "care, custody, and control" of his or her children. *See Troxel v. Granville*, 530 U.S. 57, 66 (2000). However, child protection is one of every state government's most important responsibilities.

To balance the rights of parents and the responsibility of the State of Alaska to protect children from harm, the Alaska Legislature has enacted a carefully calibrated statutory structure. *See* A.S. 47.10.005 *et seq.* Among other features, that structure includes an impartial tribunal, i.e., a Superior Court judge, the right of an indigent parent to be represented by appointed legal counsel, decisions made based on evidence vetted by compliance with the Alaska Rules of Evidence, and a record made of every proceeding for the purposes of appeal. And every parent and every child enjoys every procedural and substantive right that the Alaska Constitution and the U.S. Constitution afford.

By contrast, if *Kaltag Tribal Council v. Jackson*, No. 08-35343 (9th Cir. Aug. 28, 2009), the unpublished memorandum decision of the Ninth Circuit that is the subject of the State of Alaska's petition,

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In 2000 Kaltag had a population of 230 persons, 194 Alaska Natives, 29 Caucasians, and 7 individuals of diverse ethnic heritages. *See* Alaska Community Database.

was correctly decided, in Alaska's more than 200 "Native villages" any individuals who claim Alaska Native descent who wish to do so can — without the approval of Congress — create a "tribal court" that *over the protestation of a parent* can not only deprive the parent of custody of his or her child, but *terminate* the parent's parental rights. And the State of Alaska must give full faith and credit to those actions.

That result would be disturbing enough if "tribal courts" confined the exercise of their ersatz jurisdiction to parents and children who have a relationship to the community in which the "tribal court" is located. But as the experiences of amici curiae document, "tribal courts" are routinely attempting to disrupt parent-child relationships in communities far distant from the communities in which the "tribal courts" are located. And they are intentionally disrupting parent-child relationships that involve non-Native parents such as Donielle Taylor and Native parents such as Edward Parks who have no relationship to, and want to have nothing to do with, the community in which the "tribal court" is located.

Simply put, this Court should exercise its jurisdiction and grant the State of Alaska's petition, not just to correct a decision wrongly decided, but to end a scandal.

II. THE NINTH CIRCUIT HAS ENTERED A DECISION THAT CONFLICTS WITH NUMEROUS RELEVANT DECISIONS OF THIS COURT.

In *Kaltag Tribal Council v. Jackson* the Ninth Circuit held that § 102(d) of the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1911(d), requires the State of Alaska to give full faith and credit to an adoption decree that has been issued by a "tribal court" that has been created by respondent Kaltag Tribal Council because that result is "compelled" by a "binding precedent": *Native Village of Venetie IRA Council v. Alaska*, 944 F.2d 548 (9th Cir. 1991).

But the Ninth Circuit holding in *Native Village of Venetie IRA Council* reflects a profound misunderstanding of the most fundamental of all tenants of Federal Indian law, as well as of the doctrine of separation of powers.

This Court has repeatedly instructed that the Indian Commerce Clause, U.S. CONST., Art. I, § 8, cl. 3, grants *Congress* – not the Secretary of the Interior, and certainly not a district or circuit court – "plenary and exclusive power over Indian affairs." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 470 (1979); *Winton v. Amos*, 255 U.S. 373, 391 (1921) ("It is thoroughly established that Congress has plenary authority over the Indians and all their tribal relations"); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) ("Congress has plenary authority in all

areas in which it has substantive legislative jurisdiction").

For that reason, as the Committee on Natural Resources, which exercises jurisdiction over Native American-related legislation in the U.S. House of Representatives, has noted, the designation of a group of individuals of Native American descent as a "federally recognized tribe" is a "formal political act." *See* H.R. REP. No. 103-781, at 2-3 (1994). *Accord cf. Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 531 n. 6 (1998) ("because Congress has plenary power over Indian affairs, . . . some explicit action by Congress (or the Executive, acting under delegated authority) must be taken to create or to recognize Indian country").

"Plenary" means "Full; complete; entire." *See* BLACK'S LAW DICTIONARY 1273 (9th ed. 2009).

Nevertheless, in *Native Village of Venetie IRA Council* the Ninth Circuit held that Congress's power over Native American policy is not plenary. Rather, according to the Ninth Circuit, even though Congress has not enacted a statute that designates a group of individuals of Alaska Native descent as a "federally recognized tribe," and even though Congress has not enacted a statute that delegates the Secretary of the Interior authority to confer that legal status by final agency action, the group can become a "federally recognized tribe," and hence "sovereign" – with the governmental authority that that legal status confers (as well as sovereign immunity) – if the group can

convince a district court that its members have "some relationship with or connection to" "entities which historically acted as bodies politic, particularly in the periods prior to their subjugation by non-natives." *Id.* 557. The Ninth Circuit explained its rationale for that holding as follows:

> [I]f native groups in Alaska were sovereign prior to the incorporation of the land mass into the United States, they could lose their sovereignty only by express act of Congress or assimilation by the natives into non-native culture.
>
> Indian sovereignty flows from the historical roots of the Indian tribe. Tribal sovereignty exists unless and until affirmatively divested by Congress. Thus, to the extent that Alaska's natives formed bodies politic to govern domestic relations, to punish wrongdoers, and otherwise to provide for the general welfare, we perceive no reason why they, too, should not be recognized as having been sovereign entities. (citations omitted).

Id. 558.

That extraordinary misstatement of constitutional law reflects a mistake about which Felix Cohen, who remains an influential commentator, long ago warned when he cautioned that "[t]he term 'tribe' is commonly used in two senses, an ethnological sense and a political sense. It is important to distinguish between these two meanings of the term." *See* HANDBOOK OF FEDERAL INDIAN LAW 268 (1942 ed.).

Prior to the United States's purchase of Alaska in 1867 nomadic Alaska Native family groups whose members lived together in winter villages were "tribes" in an ethnological sense.[4] In 1880 when he conducted the first United States census in Alaska, Ivan Petroff identified 283 such villages. *See* REPORT ON THE POPULATION, INDUSTRIES, AND RESOURCES OF ALASKA 11-12, 23, 28-29, 31 (1882). But that historical fact has nothing to do with the query that this Court's repeated acknowledgment of Congress's plenary authority to decide the nation's Native American policies required the Ninth Circuit to conduct in *Native Village of Venetie IRA Council*. And that query was: had Congress, or the Secretary of the Interior, acting lawfully pursuant to authority delegated by Congress, taken a "formal political act" (by ratifying a treaty, enacting a statute, or taking final agency action) that designated the plaintiffs in that action, i.e., the Athabascan Indian residents of the Native villages of Venetie and Fort Yukon, as "federally recognized tribes?" The answer to that query was then, and is now, no.

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[4] In *Montoya v. United States*, 180 U.S. 261, 266 (1901), this Court defined an ethnological tribe as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."

Having been directed by *Native Village of Venetie IRA Council* to do so, after conducting an evidentiary hearing, the district court held that the Athabascan Indian residents of Venetie were a "federally recognized tribe" because they had a

(Continued on following page)

As authority for its invention of what the district court in Alaska subsequently characterized as the "common law test" for tribal recognition the Ninth Circuit cited *United States v. State of Washington*, 641 F.2d 1368 (9th Cir. 1981), and *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979). But neither decision stands for the rule of law for which it was cited.

In *State of Washington* treaties which the Senate ratified in 1855 and 1859 had designated five groups of Native Americans – the Duwamish, Samish, Snohomish, Snoqualmie, and Steilacoom – as "federally recognized tribes." The question the Ninth Circuit

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connection to an Athabascan Indian group that, because it satisfied the *Montoya* factors, had been an ethnological tribe. *See Native Village of Venetie IRA Council v. State*, Nos. F86-75 and F87-51 CIV (Order: Decision – Tribal Status – Dec. 23, 1991). The district court then held that the fee title land within and surrounding Venetie was not Indian country. When the plaintiffs appealed the no-Indian country portion of the decision, for reasons unrelated to the legal merits, Alaska Governor Tony Knowles ordered his Attorney General not to appeal the tribal status portion of the decision. *See* Donald Craig Mitchell, *Alaska v. Native Village of Venetie: Statutory Construction of Judicial Usurpation? Why History Counts*, 14 Alaska L. Rev. 353, 421 (1997) (Alaska Attorney General explaining to Alaska Legislature that "the decision of the Knowles Administration to withdraw the challenge to federal recognition of tribes in Alaska was not driven by litigation considerations"). As a consequence, in *Yukon Flats School District v. Venetie Tribal Government*, 101 F.3d 1286 (9th Cir. 1996), and *Alaska v. Native Village of Venetie Tribal Government*, *supra*, first the Ninth Circuit, and then this Court, simply assumed that the Athabascan Indian residents of Venetie were a "federally recognized tribe."

decided was whether certain individuals who claimed to be descendants of members of those "federally recognized tribes" could take advantage of certain treaty provisions. The status of the Duwamish, Samish, Snohomish, Snoqualmie, and Steilacoom as "federally recognized tribes" was not at issue.

In *Mashpee Tribe* the question the First Circuit decided was whether Congress had intended the word "tribe" in the Indian Nonintercourse Act of 1790, 25 U.S.C. § 177, to mean, in the nomenclature of Felix Cohen, "tribe in an ethnological sense" or "tribe in a political sense."

To the present day, when as a matter of policy it deems doing so appropriate, Congress continues to enact statutes that designate groups of individuals of Native American descent as "federally recognized tribes." *See e.g.*, Mashantucket Pequot Indian Claims Settlement Act, Pub. L. No. 98-134, 97 Stat. 851 (1983) ("Federal recognition is extended to the Tribe"). *And see most recently* H.R. 1385, 111th Cong. (2009) (bill whose enactment will create six new "federally recognized tribes" in the State of Virginia).[7] And in 1978 the Secretary of the Interior promulgated regulations that establish a procedure to enable a group of individuals of Native American descent to

[7] H.R. 1385 has passed the House – *see* 155 CONG. REC. H6101-15 (daily ed. June 3, 2009), and the Senate Committee on Indian Affairs has reported a companion bill, S. 1178, 111th Cong. (2009) – *see* S. REP. No. 111-113 (2009).

petition the Secretary to designate the group as a "federally recognized tribe." *See* 25 C.F.R. § 83.1 *et seq.* (2009).[1]

But if the Ninth Circuit correctly decided *Native Village of Venetie IRA Council*, a group of individuals of Native American descent can (not only in Alaska but also in eight other western states) circumvent Congress and the Secretary's petition procedure if it can convince a district court that its members have "some relationship with or connection to" an historic ethnological tribe. However, the Indian Commerce Clause does not allow the judiciary to assume a role that the Clause reserves exclusively to Congress.

Finally and most importantly, the Ninth Circuit's reaffirmation in *Kaltag Tribal Council v. Jackson* of its invention in *Native Village of Venetie IRA Council* of its "common law test" for tribal recognition violated the doctrine of separation of powers. As this Court admonished in *Lichter v. United States*, 334 U.S. 742, 779 (1948), and *National R.R. Corp. v. Atchison Topeka Co.*, 470 U.S. 451, 466 (1985), "it is essential that . . . the respective branches of the Government keep within the powers assigned to each by the Constitution," and that "the principal function of

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[1] In recognition that Congress had long ago decided not to create "federally recognized tribes" in Alaska, 25 C.F.R. § 83.3(a) provides: "This part applies only to those American Indian groups indigenous to the *continental* United States which are not currently acknowledged as Indian tribes by the Department." (emphasis added)

a legislature is . . . to make laws that establish the policy of the state."

In disregard of those holdings, the Ninth Circuit has usurped Congress's Indian Commerce Clause authority to decide Native American policy.

III. THE NINTH CIRCUIT HAS ENTERED A DECISION THAT CONFLICTS WITH THE INDIAN CHILD WELFARE ACT.

In 1884 when it enacted the Alaska Organic Act, 23 Stat. 24, to give the District of Alaska its first civil government Congress made a policy decision that it would not create "federally recognized tribes" in Alaska. Instead, Alaska Natives at all locations in the District, including in communities that today are ANCSA "Native villages," would be subject to the same laws to which all other residents of the District were subject.*

That was the jurisdictional situation in 1891 when Alaska Governor Lyman Knapp advised Congress:

> Since the passage of th[e Alaska Organic] Act, if not before, the courts assumed jurisdiction to try Indian offenders according to

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* Congress made that decision because beginning in 1880 the objective of its Indian policy was to prepare all Native Americans for eventual citizenship. *See* FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 (1984).

> the laws of the United States, in no case allowing local customs among the tribes or native people to have any determining influence upon questions of punishment, as has ever been the case in the States where the tribal relation is recognized.

H.R. EXEC. DOC. No. 1, Pt. 5, 52d Cong. 498 (1891).

That was the jurisdictional situation in 1932 when Secretary of the Interior Ray Lyman Wilbur advised Congress:

> In the United States statutes Alaska has never been regarded as Indian country. The United States has had no treaty relations with any of the aborigines of Alaska nor have they been recognized as the independent tribes with a government of their own. The individual native has always and everywhere in Alaska been subject to the white man's law, both Federal and territorial, civil and criminal.

Letter from Ray Lyman Wilbur to the Hon. Edgar Howard (March 14, 1932), *reprinted in Authorizing the Tlingit and Haida Indians to Bring Suit in the United States Court of Claims: Hearing on S. 1196 before the Senate Comm. on Indian Affairs*, 72d Cong. 15-16 (1932).

And that was the jurisdictional situation in 1958 when, after reviewing Congress's Alaska Native related enactments, the Alaska Supreme Court concluded:

> In a series of enactments following the Treaty of Cession [in 1867] and extending into the first third of this century, Congress has demonstrated its intent that Alaska Native communities not be accorded sovereign tribal status. The historical accuracy of this conclusion was expressly recognized in the proviso to the Alaska Indian Reorganization Act [of 1936]. . . . No enactment subsequent to the Alaska Indian Reorganization Act granted or recognized tribal sovereign authority in Alaska.

Native Village of Stevens v. A.M.P., 757 P.2d 32, 41 (Alaska 1988).[9]

But because the power the Indian Commerce Clause grants is plenary, even though it long ago decided not to create "federally recognized tribes" in

[9] In *John v. Baker I*, 982 P.2d 738, 749-50 (Alaska 1999), the Alaska Supreme Court reaffirmed the validity of its analysis in *Native Village of Stevens* of the history of Congress's Alaska Native-related enactments. However, the court then held that, in its view, Congress intended its enactment in 1994 of the Federally Recognized Indian Tribe List Act (FRTLA), Pub. L. No. 103-454, Title I, 108 Stat. 4791 (codified in part at 25 U.S.C. § 479a *et seq.*), to delegate the Secretary of the Interior authority to create "federally recognized tribes" in Alaska in Congress's stead simply by publishing in the Federal Register a list of "Native Entities Within the State of Alaska," which the Secretary did in 1995, *see* 60 Fed. Reg. 9250, 9254-55 (1995). While the validity of that misinterpretation of the intent of Congress embodied in FRTLA is not at issue here, *John v. Baker I* illustrates the continued confusion regarding Alaska Native tribal status.

Alaska, Congress has designated groups whose members are of Alaska Native descent as "Indian tribes" for specific purposes.

For example, in the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. § 450b *et seq.*), Congress designated the more than 200 business corporations that Alaska Natives have incorporated under the State of Alaska corporation code to obtain the land and monetary benefits of ANCSA as "Indian tribes" for the singular purpose of contracting for the delivery of federal programs and services to Alaska Natives. *See* 25 U.S.C. § 450b(e).

Similarly, in § 4(8) of ICWA, 25 U.S.C. § 1903(8), Congress included "Alaska Native village[s] as defined in § 1602(c) of title 43 [i.e., of ANCSA]" as "Indian tribe[s]" for the purposes of ICWA. The principal benefit of that inclusion is to grant Alaska Native ICWA "Indian tribes" a statutory right to intervene in proceedings of the Alaska Superior Court that involve "the foster care placement of, or termination of parental rights to" a child who is a member of, or eligible for membership in, the ICWA "Indian tribe." *See* 25 U.S.C. § 1911(c).

However, in § 108 of ICWA, 25 U.S.C. § 1918, Congress provided ICWA "Indian tribes" "which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 [Pub. L. No. 83-280] . . . *or pursuant to any other Federal law*"

(emphasis added) a procedural means to "reassume (sic) jurisdiction over child custody proceedings."[10]

The way § 108 of ICWA permits an ICWA "Indian tribe" to "reassume" jurisdiction is by petitioning the Secretary of the Interior. When Congress enacted ICWA, the House Committee on Interior and Insular Affairs explained that it had included § 108 in ICWA specifically because of the jurisdictional situation in Alaska. *See* H.R. REP. No. 95-1386, at 25 (1978) ("[Section 108] was adopted as an amendment in order to take into consideration special circumstances, such as those occurring in *Alaska* and Oklahoma") (emphasis added).

Chevak and Barrow are the only Alaska Native ICWA "Indian tribes" that have filed § 108 petitions which the Secretary of the Interior has approved. *See* 64 Fed. Reg. 36,391-92 (1999). However, in *Native Village of Venetie IRA Council* the Ninth Circuit held that Congress did not intend the Alaska Native ICWA "Indian tribes" at Venetie and Fort Yukon (and, by inference, at Kaltag, Minto, Evansville, and more than 200 other communities that are ANCSA "Native villages") to have to file a § 108 petition because Congress did not intend Pub. L. No. 83-280 to deprive

[10] Section 4(1) of ICWA, 25 U.S.C. § 1903(1), defines the term "child custody proceeding" to include "termination of parental rights" and "adoptive placement," i.e., the actions of the Kaltag "tribal court" that respondent Kaltag Tribal Council filed this action to try to compel the State of Alaska to give full faith and credit

any Alaska Native ICWA "Indian tribe" of "concurrent" jurisdiction.

Among its other defects, the Ninth Circuit's holding wrote the phrase "or pursuant to any other Federal law" out of § 108. Because it was not Pub. L. No. 83-280 that granted the State of Alaska exclusive jurisdiction over "child custody proceedings" at all locations in Alaska, including in ANCSA "Native villages." It was "[an]other Federal law": the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958).

THE ADVERSE EFFECT OF THE DECISION BELOW

In *Kaltag Tribal Council v. Jackson* and *Native Village of Venetie IRA Council* the Ninth Circuit's disregard of the plenary power the Indian Commerce Clause grants to Congress and its lack of understanding of the history of Congress's Alaska Native policy are inexplicable. As the State of Alaska has explained in its petition, if the Ninth Circuit's error is not corrected, in more than 200 communities that are ANCSA "Native villages," and, as amici curiae's experiences document, also in Anchorage, Fairbanks, Juneau, Sitka, and Ketchikan, the Alaska Superior Court will be divested of its exclusive jurisdiction over child custody proceedings that Congress conferred more than half a century ago in the Alaska Statehood Act. And amici curiae and other parents –

both Native and non-Native – who have found themselves entangled involuntarily with Alaska Native "tribal courts" will continue to have their custody relationships with their children disrupted in violation of procedural and substantive rights that the United States and Alaska Constitutions and the Alaska statutes guarantee.

CONCLUSION

For the foregoing reasons, amici curiae urge the Court to grant the State of Alaska's petition for a writ of certiorari.

Respectfully submitted,

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